89-504

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARILYN FINKELSTEIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether, in an action under 42 U.S.C. 405(g) for judicial review of the final decision of the Secretary of Health and Human Services denying a claim for Social Security disability benefits, the Secretary may appeal an order of the district court that rejects the Secretary's legal basis for the denial of benefits and remands the cause to the Secretary for a rehearing under a different legal standard.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases – Continued: Page

Statutes, regulations and rule:

Statutes, regulations and rule – Continued: Page

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The Solicitor General, on behalf of the Secretary of Health and Human Services, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, as amended by order dated May 19, 1989 (App., *infra*, 1a-12a), and the opinion of Judge Becker dissenting from the denial of rehearing en banc (App., *infra*, 23a-24a), are reported at 869 F.2d 215, 220. The opinion of the district court (App. *infra*, 13a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 19a-20a) was entered on March 3, 1989, and a petition for rehearing was denied on May 24, 1989 (App., *infra*, 21a-22a). By order dated August 9, 1989, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including September 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 1291 (28 U.S.C.) provides in relevant part:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court. * * *

2. Section 1292(a) (28 U.S.C.) provides in relevant part:

> Except as provided in subsections (c) and (d) of this section, [1] the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, * * * or of the judges thereof,

[1] Subsections (c) and (d) of 28 U.S.C. 1292 concern appeals to the United States Court of Appeals for the Federal Circuit, and they therefore have no application to this case.

> granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> * * * * *

3. Section 205(g) of the Social Security Act, as codified at 42 U.S.C. 405(g), provides (bracketed numbers added):

> [1] Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. [2] Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. [3] As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. [4] The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. [5] The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual

who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of the conformity with such regulations and the validity of such regulations. [6] The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. [7] Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. [8] The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. [9] Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

STATEMENT

1. Respondent is the widow of a wage earner who died on August 27, 1980, fully insured under Title II of the

Social Security Act, 42 U.S.C. 401 *et seq.* (1982 & Supp. IV 1986). On November 25, 1983, she applied for widow's disability benefits under Title II, based on coronary heart disease.

The statutory standard of disability for widows, widowers, and surviving divorced spouses[2] is different from and more stringent than that for wage earners. In the case of a wage earner, the Social Security Act provides that the term "disability" means the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months" (42 U.S.C. 423(d)(1)(A)). The Act further provides that a wage earner shall be determined to be under a disability only if his impairment is "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy" (42 U.S.C. 423(d)(2)(A) (1982 & Supp. IV 1986)). By contrast, under 42 U.S.C. 423(d)(2)(B) (1982 & Supp. IV 1986), which was enacted in 1968,[3] a widow shall not be determined to be disabled unless her impairment is "of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity."

The regulations implementing the latter statutory section, which were promulgated soon after passage of Sec-

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[2] For convenience, we shall hereafter refer to this class of persons as "widows."

[3] Social Security Amendments of 1967, Pub. L. No. 90-248, § 158(b), 81 Stat. 868.

tion 423(d)(2)(B) in 1968,[4] provide that a widow's impairment is deemed to be of sufficient severity to preclude gainful activity only if it meets or equals the severity of an impairment included in the Listing of Impairments in Appendix 1 to 20 C.F.R. Part 404, Subpart P. 20 C.F.R. 404.1577, 404.1578(a). Thus, under the regulations prescribed by the Secretary, a widow's impairment is evaluated on the basis of medical factors alone. The Secretary does not consider any further limitations on the widow's ability to work that may result from the adverse effects of her age, education, and work experience, as he would in the case of an adult wage earner. 20 C.F.R. 404.1577, 404.1578(a); see *Bowen* v. *Yuckert*, 482 U.S. 137, 140-142, 149 n.7 (1987); *id.* at 163-164 & n.3 (Blackmun, J., dissenting).

2. The Secretary denied respondent's application for widow's disability benefits under Section 423(d)(2)(B), concluding that respondent's coronary condition did not meet or equal an impairment contained in the section of the Listing that identifies presumptively disabling impairments of the cardiovascular system (App., *infra*, 16a). After respondent exhausted her administrative remedies through the Appeals Council, she sought judicial review of the Secretary's final decision, pursuant to 42 U.S.C. 405(g), in the United States District Court for the District of New Jersey.

The district court held that the Secretary's decision that respondent's coronary impairment did not meet or equal a listed impairment was supported by substantial evidence (App., *infra*, 17a). It further held, however, that the Secretary may not deny widow's disability benefits on that basis alone, but instead must make an individualized

[4] 33 Fed. Reg. 11,749, 11,751, 11,755 (1968), adding 20 C.F.R. 404.1504, 404.1506(a)(1).

determination of the functional impact of the impairment on the claimant in order to determine whether she in fact retains sufficient residual functional capacity to perform any gainful activity (*ibid.*).[5] The effect of this ruling was to invalidate the Secretary's longstanding regulations to the extent they require an applicant for widow's disability benefits to have an impairment that meets or equals a listed impairment.[6] The court therefore remanded the cause to the Secretary with directions "to inquire whether [respondent] may or may not engage in any gainful activity, as contemplated by the Act" (*id.* at 18a). See also *id.* at 25a (ordering "that the matter be remanded to the Secretary for further proceedings in accordance with [the] Court's opinion").

3. The Secretary appealed the district court's remand order. He argued that the regulations requiring an applicant for widow's disability benefits to show that she has an impairment that meets or equals the Listing are valid, and

[5] A claimant's "residual functional capacity" (RFC) is "what [the claimant] can do despite [his] impairment" (20 C.F.R. 404.1545). Under governing regulations, the Secretary measures a claimant's RFC only for the purpose of determining whether a wage-earner applicant can perform his past work or other work in the national economy, in light of his age, education, and work experience. 20 C.F.R. 404.1520(e) and (f), 404.1545(a), 404.1561; *Bowen* v. *City of New York*, 476 U.S. 467, 471 (1986). Because the Secretary does not make such a determination in the case of an applicant for widow's benefits, there is no need for him to measure a widow's RFC.

[6] A similar issue on the merits is before this Court in *Sullivan* v. *Zebley*, cert. granted, No. 88-1377 (May 15, 1989). *Zebley* involves the validity of the Secretary's regulations that require an applicant for child's disability benefits under the Supplemental Security Income Program established by Title XVI of the Social Security Act, 42 U.S.C. 1383 *et seq.* (1982 & Supp. IV 1986), to show that he has an impairment that meets or equals the severity of an impairment contained in the same adult Listing at issue here or in a special children's Listing.

that the district court therefore should have affirmed the Secretary's final decision because it correctly concluded that his finding that respondent did not have such an impairment was supported by substantial evidence. On March 3, 1989, the court of appeals dismissed the Secretary's appeal for lack of jurisdiction, holding that the district court's order was an interlocutory order, not a "final decision," for purposes of 28 U.S.C. 1291. App., *infra*, 1a-12a, 19a-20a.

The court of appeals first noted that it previously had articulated a general rule that " 'remands to administrative agencies are not ordinarily appealable under section 1291,' " because "[s]uch a remand is typically an interlocutory step in the adjudicative process and, therefore, not a final order" (App., *infra*, 4a, quoting *United Steelworkers, Local 1913* v. *Union R.R.*, 648 F.2d 905, 909 (3d Cir. 1981)). The court acknowledged that its prior cases did recognize an exception to that general rule for "cases in which an important legal issue is finally resolved and review of that issue would be foreclosed 'as a practical matter' if an immediate appeal were unavailable" (App., *infra*, 4a-5a). But after reviewing its prior cases (*id.* at 5a-9a), the court found that exception inapplicable here, because " 'it is not inexorably so' " that the legal ruling on which the district court's order was based would escape appellate review (*id.* at 9a, quoting *Bachowski* v. *Usery*, 545 F.2d 363, 373 (3d Cir. 1976)). See generally App., *infra*, 9a-12a. The court reasoned that whether the district court properly invalidated the Listing requirement would be subject to review by the court of appeals if events after the district court's remand order unfolded in a particular way, namely: (a) if the Secretary, after considering respondent's residual functional capacity on remand, made an individualized determination that respondent is not precluded from engaging in any gainful activity; (b) if respondent sought judicial review of that decision of the Secretary; (c) if the district court reversed the Secretary's new decision and ordered an award of benefits; and (d) if the Secretary appealed that subsequent order of the district court to the court of appeals. *Id.* at 9a-10a, 11a.

The court acknowledged that the Secretary may be denied any appellate review of the district court's legal ruling if events did not unfold in the manner just described—specifically if, on remand, the Appeals Council was required to find respondent disabled and awarded her benefits under the district court's view of the statutory standards governing widow's disability benefits. App., *infra*, 9a-10a, 11a. But the court concluded that this possible preclusion of any opportunity for the Secretary to obtain appellate review of the central legal issue in the case was "of no more significance" than it was in several prior Third Circuit cases (*id.* at 11a).

The court of appeals also acknowledged that, in prior cases, it had found appellate jurisdiction over district court orders that required an agency to hold a hearing or to conduct further proceedings on remand, on the theory that the order constituted a final rejection of the agency's position that no hearing or other further proceedings were required (App., *infra*, 7a-9a, 12a). But the court found that rationale inapposite here, because, in its view, the legal issue presented here was not whether the governing statute or regulations required a hearing, but whether an additional factor (respondent's residual functional capacity) must be considered by the Secretary before he makes a final administrative adjudication of the benefit claim (*id.* at 12a).

4. The Secretary's petition for rehearing en banc was denied, with three judges dissenting (App., *infra*, 21a-22a). Judge Becker, who was a member of the panel, explained his vote for rehearing en banc in a statement that was joined by Judges Sloviter and Stapleton (*id.* at 23a-24a).

Judge Becker stated that he had joined the panel's opinion because he felt bound to do so by the Third Circuit's decision in *Bachowski* v. *Usery*, 545 F.2d 363 (1976), even though *Bachowski* "seems inconsistent at least with the spirit of [the Third Circuit's] later jurisprudence" (App., *infra*, 23a). But if free to do so, Judge Becker explained, he would hold that the court of appeals had appellate jurisdiction in this case, following the reasoning of the District of Columbia Circuit's recent decision in *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 328-332 (1989). Judge Becker elaborated (App., *infra*, 23a):

> In [*Occidental Petroleum*], Judge Ginsburg, speaking for the court, expressed the view that Congress did not intend that the final order rule place an agency in a position of dependence upon the self-interest of others in order to get review of a legal decision that dictates the standards and procedures to be applied by the agency in making its decisions. Here, as in *Occidental*, the Secretary is between the proverbial rock and a hard place. If the Secretary, bound by the district court's opinion, grants benefits on remand to [respondent], he cannot appeal. If the Secretary does not grant benefits on remand, whether or not the legal issue will be reviewed depends on whether [respondent] decides to press an appeal.[7]

REASONS FOR GRANTING THE PETITION

The court of appeals has held that the Secretary of Health and Human Services may not appeal a district court order that rejects the legal basis for the Secretary's decision denying benefits and remands the cause for a

[7] On September 8, 1989, the district court, with respondent's consent, stayed its order of remand pending this Court's disposition of the instant petition for a writ of certiorari.

rehearing by the Secretary under different legal standards. Contrary to the view of the court of appeals, such an order is a "final decision" of the district court within the meaning of 28 U.S.C. 1291, because it finally determines that the decision of the Secretary that is before the court on judicial review is contrary to law and because the Secretary may be deprived of an opportunity for appellate review of the district court's legal ruling if he is required to award benefits on remand under the legal standards imposed by the district court. The text of 42 U.S.C. 405(g) confirms this conclusion, because it deems the judgment of a district court that affirms, modifies or reverses the Secretary's decision, "with or without remanding the cause for a rehearing" by the Secretary, to be a "final judgment," subject to appellate review like any other final judgment in a civil action. Such an order also is appealable pursuant to 28 U.S.C. 1292(a)(1), because it enjoins the Secretary to conduct a new hearing under different legal standards.

The question whether the Secretary may appeal an order remanding the cause to him for redetermination under different legal standards is one of substantial and recurring importance in litigation arising under the Social Security Act, and it has generated conflicting holdings among the courts of appeals in cases arising under that Act. The question of the appealability of remand orders also is of substantial importance outside the Social Security context. Review by this Court therefore is clearly warranted.

1. a. The court of appeals erred in concluding that it did not have jurisdiction over the Secretary's appeal. Under 28 U.S.C. 1291, the courts of appeals have jurisdiction of appeals from all "final decisions" of the district courts. A party ordinarily may not take an appeal under Section 1291 "until there has been a decision by the District Court that 'ends the litigation on the merits and

leaves nothing for the court to do but execute the judgment.' " *Van Cauwenberghe* v. *Biard,* 108 S. Ct. 1945, 1949 (1988), quoting *Catlin* v. *United States,* 324 U.S. 229, 233 (1945). This general rule avoids the disruption of ongoing proceedings in the trial court that would be occasioned by "piecemeal appellate review," and thus promotes the "efficient administration of justice" *(Flanagan* v. *United States,* 465 U.S. 259, 264 (1984)). In addition, the rule " 'emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial,' " thereby respecting the " 'independence of the district judge, as well as the special role that individual plays in our judicial system.' " *Van Cauwenberghe* v. *Biard,* 108 S. Ct. at 1949 n.3, quoting *Firestone Tire & Rubber Co.* v. *Risjord,* 449 U.S. 368, 374 (1981).

By the terms of Section 1291, however, "it is a final *decision* that Congress has made reviewable," not a final judgment. *Stack* v. *Boyle,* 342 U.S. 1, 12 (1951) (opinion of Jackson, J.). As a result, " 'a decision "final" within the meaning of § 1291 does not necessarily mean the last order possible to be made in [the] case.' " *Mitchell* v. *Forsyth,* 472 U.S. 511, 524 (1985), quoting *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148, 152 (1964). And in determining whether a particular type of order is immediately appealable under Section 1291, the requirement of finality must be given a "practical rather than a technical construction." *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949).

Heretofore, the Court has considered the application of 28 U.S.C. 1291 in the context of orders entered during or at the conclusion of unitary proceedings in the district court itself. In that setting, the practical construction of Section 1291 has been most evident in the "collateral order" doctrine, which recognizes a small class of decisions that are immediately appealable under Section 1291 even though they do not terminate the proceedings in the district court. That class consists of decisions "which finally determine claims of right separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. at 546. See, *e.g., Midland Asphalt Corp.* v. *United States,* 109 S. Ct. 1494, 1497 (1989). Under the common formulation of the collateral order doctrine, an order, to be immediately appealable, must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 468 (1978). See, e.g., *Lauro Lines S.R.L.* v. *Chasser,* 109 S. Ct. 1976, 1978 (1989); *Richardson-Merrill, Inc.* v. *Koller,* 472 U.S. 424, 431 (1985).

b. This case differs from the Court's prior cases applying the finality requirement of Section 1291. The order at issue here was not entered in ordinary civil or criminal litigation in district court, in which adjudication of all legal and factual issues takes place in unitary proceedings before the court. The order was entered in the quite different context of judicial review of final agency action, which in turn was the product of distinct administrative proceedings and embodied the agency's considered determination of all issues of fact and law bearing on respondent's claim for benefits.

The district court's order in this case was a "final decision" for purposes of 28 U.S.C. 1291 because it finally determined that a particular decision of the Secretary was contrary to law and remanded the matter to the Secretary to conduct a fresh round of administrative proceedings under different legal standards. Although the district

court might have occasion to consider respondent's claim for benefits again at a later date—if respondent sought judicial review of the new decision rendered by the Secretary on remand—the focus of the judicial proceedings at that point would be on the Secretary's second decision. Moreover, if the factual record before the Secretary on remand should require him to find respondent disabled and award her benefits under the legal standards imposed by the district court, the Secretary could not ordinarily seek judicial review of his own decision in favor of the claimant. The court of appeals in fact acknowledged that in those circumstances, its construction of 28 U.S.C. 1291 would require the Secretary to forgo *all* opportunity for appellate review of the district court's invalidation of the Listing approach. But see note 10, *infra*.

The foregoing considerations have led the courts of appeals to apply the principles of finality under Section 1291 with a practical regard for the unique aspects of a civil action for judicial review of agency action. They have held that, as a general rule, an order remanding a matter to an administrative agency for further proceedings is interlocutory, not final, and therefore may not be immediately appealed under 28 U.S.C. 1291. See *Occidental Petroleum Corp.* v. *SEC*, 873 F.2d 325, 329-330 (D.C. Cir. 1989) (collecting cases from every circuit). But as the District of Columbia Circuit further explained in *Occidental Petroleum*, the courts have recognized an exception to that rule where the remand order finally disposes of a legal issue on which the agency's decision was based, and the agency may not have an effective opportunity to appeal at a later date. See *id.* at 330-332. The order in the instant case falls within this exception, as Judge Becker recognized in urging the Third Circuit to follow *Occidental Petroleum*. Indeed, as we explain below (see pages 23-24, *infra*), the courts of appeals have long recognized the right

of the Secretary to take an appeal in circumstances such as those presented here.

c. The district court's order in this case was a "final decision" for purposes of 28 U.S.C. 1291 under either of two alternative theories. On the one hand, if the proceedings before the court are regarded as largely distinct from those before the agency, the remand order is appealable because it effectively terminated the relevant judicial proceedings. The order represented a final rejection of a particular decision of the Secretary (which denied respondent's application for benefits on the ground that her impairment did not meet or equal the Listing), and returned the claim for benefits to the Executive Branch officer charged with administering the disability program.

On the other hand, if the proceedings before the Secretary and those before the court are regarded as separate components of one broader controversy regarding respondent's claim for benefits,[8] the district court's order is appealable under principles analogous to those underlying the "collateral order" doctrine that the Court has recognized for certain orders entered in the course of on-going proceedings in the district court. This is so because the order finally resolves an important legal issue concerning the validity of the Secretary's regulations governing widow's disability claims; that issue is separate from the factual issues (concerning respondent's ability to perform gainful activity) that will be considered in further administrative proceedings on remand and in any subse-

[8] In *Sullivan* v. *Hudson*, 109 S. Ct. 2248, 2254-2257 (1989), the Court held that proceedings before the Secretary on remand from a district court are sufficiently related to the civil action for judicial review under 42 U.S.C. 405(g) to permit a court to award attorney's fees for services rendered before the Secretary on remand as part of its award under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), for services rendered in judicial proceedings.

quent judicial review of the Secretary's second decision in the district court;[9] and the Secretary may not have an effective opportunity for appellate review of that legal issue at a later date.[10]

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[9] In the familiar context of unitary proceedings in the district court, an order that invalidates governing regulations and sets the case for trial under a different legal standard would not satisfy the second prong of the three-prong test for collateral orders announced in *Coopers & Lybrand*, 437 U.S. at 468, because the legal issue regarding the validity of the regulations would not be "completely separate from the merits of the action." See *Daviess County Hospital* v. *Bowen*, 811 F.2d 338, 342 (7th Cir. 1987). However, neither the *Cohen* rule nor its particular requirement of a "separate" legal issue should be applied in precisely the same manner in the distinct context of judicial review of agency action. But see *Harper* v. *Bowen*, 854 F.2d 678, 681-682 (4th Cir. 1988).

The second prong of the *Coopers & Lybrand* test, like the first prong (which requires that the legal issue be "conclusively determined"), prevents an appeal before all relevant legal and factual issues have been fully developed and resolved at trial; if the legal issue addressed by the district court's order is separate, there is much less chance that subsequent developments at trial will cast new light on the issue or prompt the court to reconsider it. In the instant case, however, there will be no further development of legal or factual issues by the district court at a trial, since the further proceedings ordered by the district court will be conducted in an administrative forum. Moreover, because any deviation by the Secretary from the legal standard imposed by the district court's remand order would itself be legal error *(Sullivan* v. *Hudson*, 109 S. Ct. at 2254), the validity of the widow's disability regulations will not be open for consideration in the administrative proceedings on remand (or, presumably, in proceedings in the district court on judicial review of the Secretary's new decision). Thus, the very nature of judicial review of agency action—and of an order remanding a matter to the agency for further proceedings under different legal standards—ensures that the legal issue resolved by the remand order will be sufficiently separate from the issues to be considered in further proceedings to satisfy the concerns underlying this Court's *Coopers & Lybrand* test.

[10] In *Harper* v. *Bowen*, 854 F.2d at 681, the court believed it was "possible" that the Secretary might be able to appeal the legal ruling

Moreover, under either theory, the balance of considerations that have informed the development of finality principles under 28 U.S.C. 1291 supports the Secretary's right of appeal here. Because the order constitutes a final rejection of the Secretary's reliance on the Listing as a basis for rejecting respondent's claim—and because the rehearing of the claim mandated by the district court will take place before the Secretary, not the court—an appeal by the Secretary would not interfere with on-going proceedings in the district court or undermine the independence or special role of the district judge. Conversely, a refusal to allow the Secretary to appeal the order invalidating his longstanding regulatory requirement for widow's disability claims *would* undermine the special role and distinct responsibilities of the Secretary, the Executive

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embodied in the district court's remand order even if he was required to award benefits on remand under the different legal standards imposed by the district court. The court based that belief on its view that the Secretary must file the additional administrative record and decision on remand with the district court, and it suggested that the court could then enter a judgment in favor of the claimant on the basis of that additional record and decision and that the Secretary might be able to appeal from such a judgment.

Contrary to the Fourth Circuit's view, however, nothing in 42 U.S.C. 405(g) requires the Secretary, after a remand based on legal error in the Secretary's first decision, to file with the district court a new decision in favor of the claimant. The only situation in which 42 U.S.C. 405(g) requires a further filing with the court is specified by the sixth sentence of Section 405(g), which applies where the district court remands the cause to the Secretary for the receipt of additional evidence *before* the court reaches the merits of the Secretary's decision. See *Sullivan* v. *Hudson*, 109 S. Ct. at 2254. It may also be appropriate for the Secretary to file his new decision with the district court following the distinct type of remand at issue here for the limited purpose of enabling the district court to determine whether to award attorney's fees under the EAJA, since only then would the claimant be a prevailing party. *Id.* at 2254-2255.

Branch officer entrusted with responsibility for implementing the Social Security Act and rendering decisions on claims arising under it. Such a rule of non-appealability also would impose an unwarranted burden on "an already overburdened agency" (*Heckler* v. *Campbell*, 461 U.S. 458, 468 (1983)), because it would require the Secretary to conduct additional proceedings that would prove to be unnecessary and wasteful of scarce resources if (as the Secretary firmly believes) the regulations governing widow's disability claims are ultimately found to be valid. See *Occidental Petroleum*, 873 F.2d at 329; *Stone* v. *Heckler*, 722 F.2d 464, 467 (9th Cir. 1983); cf. *Palmer* v. *City of Chicago*, 806 F.2d 1316, 1318-1319 (7th Cir. 1986), cert. denied, 481 U.S. 1049 (1987). Thus, recognition of the Secretary's right to appeal the order at issue here would promote, not undermine, the "efficient administration of justice" (*Flanagan*, 465 U.S. at 264).

d. For similar reasons, if the remand order is not regarded as a final judgment that effectively terminated the relevant proceedings in the district court, the court of appeals also had jurisdiction in this case under 28 U.S.C. 1292(a)(1). Section 1292(a)(1) vests the courts of appeals with jurisdiction of appeals from interlocutory orders granting or denying injunctions. The district court's order in this case had the effect of granting an injunction, because it did more than simply remand the cause; it "directed" the Secretary to conduct further proceedings to inquire whether respondent can engage in any gainful activity (App., *infra*, 18a). See *Avery* v. *Secretary of HHS*, 762 F.2d 158, 160 (1st Cir. 1985); but see *United States* v. *Louisiana-Pacific Corp.*, 846 F.2d 43, 45 (9th Cir. 1988). The order did not merely govern the conduct of the parties in connection with proceedings before the district court itself on matters unrelated to substantive issues in the case. See *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 108 S. Ct. 1133, 1138 (1988); *International Products Corp.*

v. *Koons*, 325 F.2d 403, 406-407 (2d Cir. 1963). Rather, it granted partial relief on the merits and ordered further proceedings in a different forum. Compare *Switzerland Cheese Ass'n* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 183 (1955); *Morgantown* v. *Royal Insurance Co.*, 337 U.S. 254, 257-258 (1949); *Hunt* v. *Bankers Trust Co.*, 799 F.2d 1060, 1066-1067 (5th Cir. 1986).[11]

2. a. Both of the alternative theories of appealability under 28 U.S.C. 1291 discussed above were articulated in *Cohen* v. *Perales*, 412 F.2d 44, 48-49 (5th Cir. 1969), rev'd on other grounds, 402 U.S. 389 (1971), the seminal decision confirming an agency's right of appeal in circumstances such as these. In *Perales*, the district court reversed the Secretary's decision denying the claim for benefits and remanded for a new hearing on the ground that the written reports of medical experts, on which the administrative law judge relied, did not constitute substantial evidence to support the Secretary's decision denying the claim for benefits. The court of appeals held that it

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[11] The Third and District of Columbia Circuits have construed *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84-90 (1981), not to require a showing, in all circumstances, that an order *granting* an injunction must have serious and perhaps irreparable consequences in order to be appealable under 28 U.S.C. 1292(a)(1). See *Cohen* v. *Board of Trustees of University of Medicine*, 867 F.2d 1455, 1466-1468 (3d Cir. 1989); *I.A.M. Nat'l Pension Fund* v. *Cooper Industries, Inc.*, 789 F.2d 21, 24 n.3 (D.C. Cir. 1986); see also *Baltimore Contractors*, 348 U.S. at 182 ("The appealability of routine interlocutory injunctive orders raised few questions."); P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *The Federal Courts and the Federal System* 1816-1817 (3d ed. 1988). But see *Thompson* v. *Enomoto*, 815 F.2d 1323, 1327 (9th Cir. 1987).

had jurisdiction over the Secretary's appeal from the district court's order under 28 U.S.C. 1291.[12]

In holding that the order was "final" in the usual sense of concluding the judicial proceedings, the Fifth Circuit in *Perales* relied on the fourth and eighth sentences of 42 U.S.C. 405(g). See 412 F.2d at 48. The fourth sentence provides that on judicial review, a district court "shall have power to enter * * * a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." The eighth sentence provides that "[t]he judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions." These two sentences make it clear that a district court order that sets aside the Secretary's decision on the merits because of legal error is not deprived of its finality—at least insofar as the Secretary's right of appeal is concerned—simply because the district court also remands the cause for a rehearing by the Secretary.[13] Whether or not it remands the cause, the district court's ruling constitutes a final rejection of the *first* decision of the Secretary. If the Secretary again finds the claimant not disabled in the proceedings on remand, it would be that *second* decision of the Secretary that would be the subject of any subsequent application for judicial

[12] See also *Gold* v. *Weinberger*, 473 F.2d 1376, 1378 (5th Cir. 1973).

[13] The term "judgment" is a term of art that "includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). Accordingly, Congress's use of the term "judgment" in the fourth sentence of 42 U.S.C. 405(g) to encompass orders that remand the cause to the Secretary strongly supports the Secretary's right of appeal here. This conclusion is reinforced by the specification in the eighth sentence that the "judgment" of the district court (which necessarily includes those mentioned in the fourth sentence that remand the cause to the agency) "shall be final" and "shall be subject to review in the same manner as a judgment in other civil actions."

review. For this reason, the Fifth Circuit in *Perales* correctly relied on 42 U.S.C. 405(g) in finding jurisdiction over the Secretary's appeal because the district court's order effectively terminated the relevant judicial proceedings.

The Fifth Circuit in *Perales* also relied on "collateral order" principles in finding the district court's remand order appealable. 412 F.2d at 48-49. It noted that the district court not only had denied the motions for summary judgment and reversed the Secretary's decision on the merits, but also had established standards for the admission of hearsay evidence in the administrative proceedings on remand. Following this Court's admonition to give Section 1291 a practical rather than a technical construction, the Fifth Circuit concluded that such an order fit the rationale of *Cohen* v. *Beneficial Industrial Loan Corp.* The court reasoned that "[u]nless the Secretary is allowed to appeal from this order, he will never be able to reach the questions involved, because on the next appeal, if there is one, the sole question may be the substantiality of the evidence, and not its admissibility." 412 F.2d at 48.

b. The Fifth Circuit stressed in *Perales* that not all remand orders in Social Security cases are immediately appealable. The court specifically referred in this regard to orders covered by the sixth sentence of Section 405(g), which allows a district court, *before* it reaches the merits of the Secretary's decision, to remand the cause to the Secretary for the receipt of additional evidence. 412 F.2d at 48. This procedure was included to provide a mechanism for the receipt of newly discovered evidence in a case in which judicial review of the Secretary's decision is based on the administrative record.[14] By contrast, the

[14] We agree that such an order is not appealable, because it does not represent a final rejection of the Secretary's decision that is the subject

order in this case (like that in *Perales*) did represent a final rejection of the Secretary's decision, which denied respondent's claim because her impairment did not meet or equal the Listing.

c. This Court reversed the Fifth Circuit's ruling on the merits in *Perales*, without questioning the jurisdiction of the court of appeals over the Secretary's appeal from the district court's remand order. See *Richardson* v. *Perales*, 402 U.S. 389 (1971). Because the jurisdictional issue was discussed at length in the Fifth Circuit's opinion—and because the jurisdiction of this Court under 28 U.S.C. 1254(1) depended on whether the case was properly "in" the court of appeals under 28 U.S.C. 1291 (see *United States* v. *Nixon*, 418 U.S. 683, 690, 692 (1974))—the Court presumably would have adverted to the jurisdictional issue if it had questioned the correctness of the Fifth Circuit's resolution of it. Since that time, a number of other courts

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of judicial review. See *Perales*, 412 F.2d at 48, citing *Bohms* v. *Gardner*, 381 F.2d 283 (8th Cir. 1967) (Blackmun, J.), cert. denied, 390 U.S. 964 (1968). The prior Third Circuit Social Security cases cited by the panel below were remands pursuant to the sixth sentence of 42 U.S.C. 405(g). See App., *infra*, 5a, citing *Mayersky* v. *Celebrezze*, 353 F.2d 89 (3d Cir. 1965); *Marshall* v. *Celebrezze*, 351 F.2d 467 (3d Cir. 1965). Moreover, in *Bohms*, *Mayersky*, and *Marshall*, the appeal from the remand order was taken by the claimant, not the Secretary. A number of courts have held that the claimant may not appeal a remand order under 28 U.S.C. 1291, since he may seek judicial review of any adverse decision of the Secretary on remand. See *Dalto* v. *Richardson*, 434 F. 2d 1018 (2d Cir. 1970), cert. denied, 401 U.S. 979 (1971); *Beach* v. *Bowen*, 788 F.2d 1399 (8th Cir. 1986); *Gilchrist* v. *Schweiker*, 645 F.2d 818 (9th Cir. 1981); *Farr* v. *Heckler*, 729 F.2d 1426 (11th Cir. 1984); *Howell* v. *Schweiker*, 699 F.2d 524 (11th Cir. 1983); see also *Occidental Petroleum*, 873 F.2d at 331-332; *Mall Properties, Inc.* v. *Marsh*, 841 F.2d 440, 442-443 (1st Cir.), cert. denied, 109 S. Ct. 128 (1988); *Memorial Hospital System* v. *Heckler*, 769 F.2d 1043 (5th Cir. 1985).

of appeals have followed *Perales*. In fact, insofar as we have been able to ascertain, it was not until quite recently, long after 42 U.S.C. 405(g) was enacted in 1939,[15] that any court has held that the Secretary may not appeal a remand order under Section 405(g) in circumstances such as those presented here.

3. The jurisdictional ruling by the Third Circuit in this case conflicts not only with the decision in *Perales* but also with the decisions of a number of other courts of appeals. The First, Sixth, Ninth and Tenth Circuits have followed *Perales* in finding jurisdiction over appeals by the Secretary from remand orders. See *Colon* v. *Secretary of HHS*, 877 F.2d 148, 149-151 (1st Cir. 1989); *Lopez Lopez* v. *Secretary of HEW*, 512 F.2d 1155, 1156 (1st Cir. 1975); *Edmond* v. *HHS*, No. 89-3161 (6th Cir. Apr. 19, 1989);[16] *Stone* v. *Heckler*, 772 F.2d 464, 466-468 (9th Cir. 1983); *Ensey* v. *Richardson*, 469 F.2d 664 (9th Cir. 1972); *Paluso* v. *Mathews*, 573 F.2d 4, 7-8 (10th Cir. 1978) (Black Lung case); see also *McGill* v. *Secretary of HHS*, 712 F.2d 28, 29-30 (2d Cir. 1983) (dictum), cert. denied, 465 U.S. 1068 (1984). The Seventh Circuit has reached a similar result under the parallel judicial review provisions of the Medicare Act. See *Daviess County Hospital* v. *Bowen*, 811 F.2d 338, 341-342 (7th Cir. 1987); *Edgewater Hospital, Inc.* v. *Bowen*, 857 F.2d 1123 (7th Cir. 1988).[17] Moreover, the District of Columbia Circuit, which apparently has not had occasion to address the appealability issue in the

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[15] Act of Aug. 10, 1939, ch. 686, § 201, 53 Stat. 1368.

[16] But cf. *Whitehead* v. *Califano*, 596 F.2d 1315, 1319 (6th Cir. 1979) (Secretary may not appeal remand order by magistrate where Secretary did not first appeal order to district court).

[17] The Seventh Circuit had expressed a similar view in dictum in an earlier decision under the Social Security Act that was cited in *Perales*. See 412 F.2d at 48, citing *Jamieson* v. *Folsom*, 311 F.2d 506, 507 (7th Cir.), cert. denied, 374 U.S. 487 (1963).

Social Security context, recently held in *Occidental Petroleum*, after a thorough examination of the issue in an analogous context, that an agency may appeal a remand order under 28 U.S.C. 1291. See also *Bender* v. *Clark*, 744 F.2d 1424, 1426-1428 (10th Cir. 1984).

Other courts of appeals that also once held the Secretary may appeal a remand order have since expressed a contrary view, albeit without acknowledging their own contrary precedent.[18] For example, although the Fourth Circuit previously had followed *Perales* in holding that the Secretary could appeal a remand order in a Black Lung case (see *Souch* v. *Califano*, 599 F.2d 577, 578 n.1 (1979)), it more recently held, without mentioning its prior ruling, that the Secretary may not appeal a remand order under similar circumstances. See *Harper* v. *Bowen*, 854 F.2d 678 (4th Cir. 1988). Similarly, although the Eighth Circuit had found jurisdiction over an appeal by the Secretary even prior to *Perales* (*Gardner* v. *Moon*, 360 F.2d 556, 558 n.2 (8th Cir. 1966)), it since has stated in dictum, without mentioning *Moon*, that the Secretary may not take an appeal under 28 U.S.C. 1291. *McCoy* v. *Schweiker*, 683 F.2d 1138, 1141 n.2 (8th Cir. 1982) (en banc). Most remarkably, the Fifth Circuit recently held in an unpublished order that the Secretary could not appeal a remand order, and it did so without even citing its own contrary precedent in *Perales*. See *Haywood* v. *Bowen*, No. 88-1280 (Nov. 30, 1988) (862 F.2d 873 (1988) (Table)).[19]

[18] Even the Third Circuit, in the *Bachowski* decision upon which the panel relied in this case, appeared to acknowledge the correctness of the *Perales* rule, while finding it inapplicable on the facts of *Bachowski* itself. 545 F.2d at 367 & n.16, 372-373. By contrast, the Third Circuit did not even cite *Perales* and its progeny in its decision in this case.

[19] The Eleventh Circuit, which is bound by Fifth Circuit precedents (see *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc)), has expressly followed the Fifth Circuit's *Perales* precedent in finding several remand orders appealable. See *Pickett* v. *Bowen*, 833 F.2d 288, 290-291 (11th Cir. 1987); *Huie* v. *Bowen*, 788 F.2d 698, 701-703 (11th Cir. 1986). In two other cases, however, it dismissed appeals by the Secretary in brief orders, without even citing *Perales*. See *Jordan* v. *Heckler*, 721 F.2d 349 (11th Cir. 1983); *Biddle* v. *Heckler*, 721 F.2d 1321 (11th Cir. 1983).

The jurisdictional issue presented by this case is of recurring importance in litigation arising under the Social Security Act, since claimants increasingly raise jurisdictional objections to appeals by the Secretary from remand orders, even in circuits that previously had sustained the Secretary's right of appeal. The jurisdictional issue also is one of recurring importance outside the Social Security context, where it has generated thoughtful analyses by several other courts of appeals that have sustained the agency's right of appeal. See *Occidental Petroleum Corp.* v. *SEC*, *supra*; *Mall Properties, Inc.* v. *Marsh*, 841 F.2d 440, 442-443 (1st Cir.), cert. denied, 109 S. Ct. 128 (1988); *Bender* v. *Clark*, *supra*. The decision of the Third Circuit conflicts with these jurisdictional rulings outside the Social Security context, as well as those, discussed above, in cases arising directly under that Act. Review by this Court therefore is plainly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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SEPTEMBER 1989

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88-5318

MARILYN FINKELSTEIN, APPELLEE

v.

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

On Appeal from the United States District Court for the District of New Jersey
(D.C. Civil Action No. 85-0345)

[Filed Mar. 3, 1989]

OPINION

BEFORE: BECKER, HUTCHINSON and SCIRICA, *Circuit Judges*

HUTCHINSON, *Circuit Judge.*

The Secretary of Health and Human Services (Secretary) appeals an order of the United States District Court for the District of New Jersey. The district court had remanded this action for widow's disability benefits under the Social Security Act to the Secretary for consideration of the applicant's residual functional capacity.

That order is not final for purposes of appellate review. We will therefore dismiss this appeal for lack of jurisdiction.

I.

On November 25, 1983, Mrs. Marilyn Finkelstein applied for disabled widow's benefits pursuant to 42 U.S.C.A. § 423(d)(2)(B) (West Supp. 1988). Her application was denied both initially and on reconsideration. After a hearing on September 28, 1984, an Administrative Law Judge (ALJ) determined that Mrs. Finkelstein's heart ailment did not meet or equal an impairment listed in the regulations[1] and denied benefits. That denial became the Secretary's final decision on December 11, 1984, when the Appeals Council denied Mrs. Finkelstein's request for review.

Pursuant to 42 U.S.C.A. § 405(g) (West 1983), Mrs. Finkelstein filed suit in the district court, claiming that the ALJ's decision was not supported by substantial evidence. The district court rejected this argument, but nevertheless remanded the case to the Secretary "for reasons other than those cited by [the] plaintiff." *Finkelstein v. Bowen*, No. 85-0345, slip op. at 5 (D.N.J. Feb. 18, 1988). It directed the Secretary to consider "the functional impact of plaintiff's ailment," *id.*, in order to determine whether, beyond the issue of equivalence of impairments, Mrs. Finkelstein could yet engage in any gainful activity. *Id.* at 6. This appeal followed.

On the merits, the Secretary argues that, in the case of widow's disability benefits, the statute and applicable regulations require him to look only to whether an applicant's impairment meets or equals an impairment listed in

[1] 20 C.F.R. Part 404, Subpart P, Appendix 1 (1987).

the regulations.[2] The inquiry, he contends, does not extend, as in the case of a wage earner's disability, to examination of residual functional capacity.[3] Instead, the Secretary argues, a widow's disability is governed by a stricter standard[4] and a denial of benefits is required if her

[2] Under the Social Security Act, a widow is not disabled "unless . . . her physical or mental impairment or impairments are of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity." 42 U.S.C.A. § 423(d)(2)(B).

The "regulations prescribed by the Secretary" for deeming impairments sufficiently severe to preclude any gainful activity mandate a two-step inquiry. First, a widow is not disabled if she is "doing substantial gainful activity." 20 C.F.R. § 404.1578(b) (1987). Second, a widow is disabled if her "impairment(s) has specific clinical findings that are the same as those for any impairment in the Listing of Impairments in Appendix 1 or are medically equivalent to those for any impairment shown there." *Id.* § 404.1578(a)(1). These impairments, by virtue of their inclusion in the regulatory listing, are considered "severe enough to prevent a person from doing any gainful activity." *Id.* § 404.1525(a) (1987).

[3] Under the Social Security Act, a wage earner's disability is defined, in relevant part, as "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." 42 U.S.C.A. § 423(d)(1)(A) (West Supp. 1988). The process for determining a wage earner's disability includes inquiries into whether the wage earner is engaged in substantial gainful activity, has a severe impairment, and whether this impairment meets or equals any in the regulatory listing. However, if a wage earner's impairment does not meet or equal any in the listing, the inquiry continues for the purpose of determining whether his residual functional capacity allows him to do past work and, finally, whether his residual functional capacity, along with vocational factors like age, education, and past work experience, allows him to do any other work. 20 C.F.R. § 404.1520 (1987).

[4] The regulations expressly state that age, education, and past work experience are ignored when evaluating a widow's disability. 20 C.F.R. § 404.1577 (1987). On the merits, the issue is whether a widow

impairment is not equivalent to one listed in the regulations.

II.

At the threshold, we are faced with the question of appellate jurisdiction. Both parties initially asserted[5] that we have jurisdiction under 28 U.S.C.A. § 1291 (West Supp. 1988). That section gives us the authority to review "final orders" of the federal district courts. We have said that "remands to administrative agencies are not ordinarily appealable under section 1291." *United Steelworkers of America Local 1913 v. Union R.R.*, 648 F.2d 905, 909 (3d Cir. 1981). Such a remand is typically an interlocutory step in the adjudicative process and, therefore, not a final order. *Id.* Therefore, we can exercise appellate jurisdiction over this case only if it comes within an exception to the ordinary rule.

Case law does provide examples of a narrow exception to the normal rule of non-appealability. Application of this exception is limited to cases in which an important

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whose impairment does not meet or equal any in the listing is entitled to have her residual functional capacity considered. Because we lack appellate jurisdiction over the district court's interlocutory order remanding the case to the Secretary, we express no opinion on that issue. We have held, however, that a stricter standard does apply in widow's disability cases. *See, e.g., Smith v. Schweiker*, 671 F.2d 789, 790 (3d Cir. 1982) ("the test for establishing entitlement to disability benefits is more stringent for widows").

[5] At oral argument on September 8, 1988, we requested letter memoranda on this question of appellate jurisdiction. By her letter memorandum dated September 21, 1988, Mrs. Finkelstein now contends that the district court's order is not appealable and that we lack jurisdiction. The Secretary contends the district court's order is appealable. The parties' positions on jurisdiction are, of course, not controlling.

legal issue is finally resolved and review of that issue would be foreclosed "as a practical matter" if an immediate appeal were unavailable. *See, e.g., AJA Assocs. v. Army Corps of Eng'rs*, 817 F.2d 1070, 1073 (3d Cir. 1987). Whether applying the normal rule or the exception, our inquiry focuses on "the particular order brought to this court." *Bachowski v. Usery*, 545 F.2d 363, 372 (3d Cir. 1976); *see also United Steelworkers*, 648 F.2d at 909 ("To assess these contentions, we must consider the nature of the district court's order.").

After examining the circumstances of the cases applying the normal rule of non-appealability and those holding that appellate jurisdiction over particular remand orders is available, we have concluded that the exception to the normal rule does not apply. Therefore, we lack appellate jurisdiction.

A.

We turn first to cases in which we applied the normal rule and held district court remand orders interlocutory rather than final. In *Marshall v. Celebrezze*, 351 F.2d 467 (3d Cir. 1965) (per curiam), a Social Security disability case, the Secretary asked the district court to remand so he could take additional evidence. The district court granted the motion and the applicant appealed. We dismissed the appeal as interlocutory. *See also Mayersky v. Celebrezze*, 353 F.2d 89 (3d Cir. 1965) (district court remand to obtain additional evidence in Social Security disability case not final).

Our decision in *Bachowski* is particularly relevant. Alleging violations of the Labor-Management Reporting and Disclosure Act and other irregularities, Bachowski sought to overturn the results of a union officer election. The Secretary of Labor refused to file suit to set aside the

election, but gave no reasons. Bachowski filed an action against the Secretary, in district court, seeking an order compelling him to file suit. The district court dismissed the case for lack of subject matter jurisdiction. On appeal, we held that the district court did have subject matter jurisdiction and that the scope of judicial review extended to the factual basis for the Secretary's decision not to file suit as well as the factors on which he relied in reaching it. *Bachowski v. Brennan*, 502 F.2d 79, 90 (3d Cir. 1974). On *certiorari*, the Supreme Court agreed that the district court had subject matter jurisdiction and that the Secretary was required to provide "a statement of reasons supporting his determination." *Dunlop v. Bachowski*, 421 U.S. 560, 571 (1975). It held, however, that judicial review "should be confined to examination of the 'reasons' statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious." *Id.* at 572-73. On remand, the district court ordered the Secretary to submit a supplemental reasons statement after finding the initial statement inadequate. *Bachowski v. Brennan*, 405 F. Supp. 1227, 1234 (W.D.Pa. 1975). Upon examining the supplemental statement, the district court held that the method the Secretary used to determine whether the alleged violations affected the outcome of the election and, therefore, whether to bring suit, was irrational. It remanded for a recount with directions as to the proper counting method. *Bachowski v. Brennan*, 413 F. Supp. 147, 151 (W.D.Pa. 1976).

On appeal, we held this remand was interlocutory. *Bachowski*, 543 F.2d at 372. Ultimately, the complaint sought an order directing the Secretary to file suit. The district court remanded only for further proceedings. We distinguished "the ultimate substantive issue presented by [the] appeals" from "the final question posed by Mr.

Bachowski's complaint." *Id.* at 372 n.58. "It is the answer to the latter, not the former inquiry that constitutes a final judgment under the traditional test of finality." *Id.* We also said that the issue of the proper method for counting votes might not escape later review. "By way of illustration, if the Secretary, after remand, would continue in his refusal to bring suit, and the district court ordered him to do so, the viability of the mode of review employed by [the court] would be before us on review." *Id.*

B.

This case does not present circumstances analogous to the cases in which we held there was appellate jurisdiction. *United Steelworkers* is an example of such a case. We expressly based our holding on the peculiar circumstances of the case. There, the district court's order set aside the decision of a public law board, directed that on remand one member of the board be removed, and further directed the board to remand the case to the railroad for a *de novo* investigative hearing into the termination of one of its employees. *United Steelworkers*, 648 F.2d at 909. In analyzing the order to decide if it was "final" and therefore appealable for purposes of § 1291, we held that it had "the practical effect of dismissing the present litigation" because it "permanently disposed of all findings and orders of the Board." *Id.* at 909, 910. We also concluded that, due to the very limited scope of judicial review over board findings under the Railway Labor Act, the railroad would probably not be able to appeal the Board's order after a remand, thereby precluding any future opportunity to challenge the district court's order. *Id.* at 910. Therefore, "because of the unusual circumstances of [the] case," we found the order final. *Id.* at 911.

Horizons Int'l, Inc. v. Baldrige, 811 F.2d 154 (3d Cir. 1987), is another example illustrating the exception to the normal rule of non-appealability. It involved the issuance of a certificate of review[6] by the Secretary of Commerce for a proposed joint venture in the export sale of caustic soda and chlorine. Horizons challenged the issuance of the certificate and moved to limit discovery to the administrative record. The government moved for summary judgment. The district court remanded the case to the Secretary and the Attorney General to consider five specific questions "which raise genuine issues of material fact concerning whether the grant of a certificate of review . . . was arbitrary, capricious, and an abuse of discretion." *Id.* at 158. The five questions necessarily involved material outside of the administrative record. We held this order was final on two grounds. As in *United Steelworkers*, it acted both as a final disposition of the issues on appeal and an effective preclusion of future review. We reasoned that a remand would require further proceedings based on evidence outside of the agency record, thereby mooting the agency's contention that the present record was adequate to support its action. *Id.* at 160. We distinguished this order from an order postponing final disposition where the plaintiff did not yet have a vested interest in obtaining the relief he sought. *See e.g., Bachowski*, 545 F.2d at 363.

In *AJA Associates*, the Army Corps of Engineers (Corps) had denied AJA's application for a dredge-and-fill permit in connection with property it owned in Florida. AJA filed suit to set aside the denial and the Corps moved for summary judgment. The district court held that AJA

[6] A certificate of review provides limited antitrust immunity and must be approved by both the Secretary of Commerce and the Attorney General. *See Horizons International*, 811 F.2d at 157.

was entitled to appear at an " 'informal oral hearing before a proper agency officer' " to respond to the Corps' reasons for denying the permit. *AJA Associates*, 817 F.2d at 1072 (quoting district court order). We said this order was final because the district court's decision "opens up for all applicants the argument, raised after permit denial, that due process requires a hearing in their particular cases." *Id.* at 1073. If the Corps conducted a hearing and either denied or granted a permit, the right-to-hearing issue would have been moot on appeal. *Id.* "[W]hen a district court finally resolves an important legal issue in reviewing an administrative agency action and denial of appellate review before remand to the agency would foreclose appellate review as a practical matter, the remand order is immediately appealable." *Id.*

Likewise, in *United States v. Spears*, 859 F.2d 284 (3d Cir. 1988), we held that a district court order directing a federal agency to comply with a Pennsylvania statute requiring notice before foreclosure proceedings was final. As in *AJA Associates*, the issue would have become moot and escaped review whether or not, on remand, the agency complied and gave the notice. *Spears*, 859 F.2d at 287.

III.

The Secretary argues that he will be unable to raise the issue of whether a widow's residual functional capacity is relevant to her claim for widow's disability benefits later if we do not exercise appellate jurisdiction over this particular remand order. We rejected the same argument by the Secretary of Labor in *Bachowski* and by Conrail in *Brotherhood of Maintenance of Way Employees v. Consolidated Rail Corp.*, 864 F.2d 283 (3d Cir. 1988). As in *Bachowski*, "it is not inexorably so" that consideration of this issue will escape review.

Bachowski is similar in its procedural posture to this case. If the Secretary, after consideration of Mrs. Finkel-

stein's residual functional capacity on remand, persists in refusing benefits and the district court orders that they be granted, the issue of whether residual functional capacity is relevant would be subject to our review. The possibility that it would be unreviewable if the Secretary awards benefits is no different than the possibility in *Bachowski* that the district court's order directing certain vote counting procedures would be unreviewable if the Secretary decided to file suit to set aside the election after utilizing those procedures. Review may become unavailable, but it is not necessarily unavailable, as in *AJA Associates*.

Recently we held that a district court order remanding a railroad employees' discipline case to the National Railroad Adjustment Board "to 'hear evidence as to whether [the employees] were sufficiently responsible for the accidents in question to warrant their dismissal' " was interlocutory. *Brotherhood of Maintenance of Way Employees, id.* at 285 (quoting district court order). Although *Brotherhood* is distinguishable on the ground that the Adjustment Board, there the agency, was not a party, we nevertheless relied on the general principle "that district court orders remanding cases to administrative agencies are not final and appealable." *Id.* at 285-286. We did so despite expressing concern over the district court's apparent interference with the arbitration board's power. *Id.* at 289. We distinguished *United Steelworkers* because there the order " 'had the practical effect of dismissing the present litigation and review of the legal questions raised by this appeal will be foreclosed if not permitted now.' " *Id.* at 286 (quoting *United Steelworkers*, 648 F.2d at 909). In discussing *Bachowski*, Judge Sloviter went on to say:

> The Secretary and the union appealed the district court's remand order to this court arguing, as Conrail argues here, that if this court did not accept jurisdiction the Secretary "may very well [be] deprive[d] . . . of any opportunity to test the correctness of the scope of review employed by [the district court]." *Id.* at 372. We rejected this argument on the ground that the mode of review used by the district court would be reviewable if the district court later ordered the Secretary to file suit, an issue that remained undecided.

Id. Despite the fact that the agency was not a party, *Brotherhood* points up how strongly the finality principle of avoiding piecemeal review pulls in favor of permitting even a decision interfering with other important policies to stand.[7]

Here, too, the ultimate question of whether the district court correctly ordered the Secretary to consider Mrs. Finkelstein's residual functional capacity would become reviewable if the district court orders the Secretary to grant benefits because she is so lacking in residual functional capacity that she cannot engage in any gainful activity. Although the Secretary may be denied review if he orders benefits to be paid upon consideration of Mrs. Finkelstein's residual functional capacity, that possibility is of no more significance than the possible unavailability of review was to Conrail in *Brotherhood of Maintenance of Way Employees*. Of course, if benefits are denied, Mrs. Finkelstein may obtain review.

The principle of finality serves important institutional functions. In serving them, issues which seem burning to the litigants in the course of an individual dispute often disappear, become subsumed in the final decision, and escape review in a particular case. When they involve questions of general significance they are likely to recur in

[7] We recognize the importance of the distinction between our case of *Bachowski* on the one hand and *Brotherhood* on the other. We do not therefore believe *Brotherhood* is controlling, but instead look to *Bachowski*, which we believe does control.

future cases in a posture which does present them for appellate review. Such is this case. It deals with an issue likely to recur in future cases and arises in an administrative procedure strongly analogous to common law adjudication of individual disputes.

The particular district order here at issue is interlocutory, not final. The district court remanded Mrs. Finkelstein's case to the Secretary "for further proceedings." It ordered the Secretary to consider her residual functional capacity before deciding the question of eligibility. This remand concerned the factors for consideration in the adjudicatory process and not, as in *AJA Associates, supra,* only the form that process must take.

Here, as in *Bachowski,* the district court remanded for further consideration according to its guidelines. In *Bachowski,* the guidelines related to the method of vote counting; here, they relate to consideration of residual functional capacity. Unlike the appellant in *Horizons International,* Mrs. Finkelstein has no vested right in anything; the court did not take away something which she had already been given, but postponed final disposition in her case until the Secretary had considered an additional factor. Unlike *AJA Associates,* the district court did not order a hearing when the issue was whether the statute or the regulations required a hearing; instead, it ordered consideration of an additional factor before final administrative adjudication of the benefit issue.

The institutional concerns precluding appellate review of non-final orders prevail and deprive this Court of appellate jurisdiction over the district court's order remanding this case to the agency for consideration of residual functional capacity. The district court's order remanding Mrs. Finkelstein's case to the Secretary for consideration of her residual functional capacity in determining her eligibility for widow's disability benefits is interlocutory, not final. Accordingly, we will dismiss this appeal for lack of appellate jurisdiction.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 85-345 (GEB)

MARILYN FINKELSTEIN, PLAINTIFF

v.

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

[Filed Feb. 18, 1988]

OPINION

BROWN, *District Judge*

Plaintiff, Marilyn Finkelstein, seeks review under § 205(g) of the Social Security Act, as amended, 42 U.S.C. § 405(b), to review a final determination of the Secretary of Health and Human Services (Secretary) which denied plaintiff's application for widow's disability insurance benefits under sections 202(e) and 223 of the Social Security Act, as amended.

Standard of Review

A decision of the Administrative Law Judge (ALJ) concerning disability benefits must be upheld by the Court if after review of the record, there is substantial evidence supporting the decision. 42 U.S.C. § 405(g). Substantial evidence has been defined as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Richardson v. Perales, 402 U.S. 389, 409 (1971) (citations omitted). This Court is to look at the record as a whole and then determine whether or not there is substantial evidence to support the decision. *Taybron v. Harris*, 667 F.2d 412, 413 (3d Cir. 1981) (*quoting Hess v. Secretary of Health, Education and Welfare*, 497 F.2d 837, 841 (3d Cir. 1974)).

Prior Proceedings

Plaintiff initially filed an application for widow's insurance benefits on November 25, 1983. The application was denied on February 3, 1983 and again upon reconsideration on March 28, 1984. On September 12, 1984, a hearing was held before an Administrative Law Judge (ALJ) to review plaintiff's application. The ALJ's decision of September 28, 1984 found the plaintiff to be not a "disabled widow within the meaning of the Social Security Act." This decision became the final decision of the Secretary when the Appeals Council denied plaintiff's request for review on December 11, 1984. The plaintiff then filed a complaint in this Court appealing the ALJ's decision.

Evidence Presented

Plaintiff was born on August 11, 1930. She is the widow of a wage earner who died fully insured on August 27, 1980. Plaintiff's physician, Dr. Su, submitted his analysis wherein he states that plaintiff suffers form [*sic*] frequent chest pain and has a strong family history of coronary heart disease. (Tr. 144-45). Also, he states that plaintiff "has always had an abnormal cardiogram, namely, left ventricular hypertrophy with ST depression of ischemia. Examination revealed holo systolic murmur at apex suggestive of mitral regurgitation." (*Id.*) The physician concludes that plaintiff suffers from "1) Arteriosclerotic coronary heart disease with coronary insufficiency with recurrent angina, class III B. 2) Mitral valve prolapse syndrome with frequent palpitations." (*Id.*) In a letter dated June 27, 1984, Dr. Su also maintains that "[t]here is no doubt in my mind that Mrs. Finkelstein is totally disabled physically and also requires medical supervision regularly." (Tr. 146-47).

Also before the ALJ were the interrogatories propounded by the ALJ on Dr. Arthur Bauman. Dr. Bauman answered "no" to the following: "In your opinion, does the claimant suffer from an illness or impairment which meets the specific criteria in the Listing of Impairments." In response to the question of whether plaintiff suffers from "an impairment or illness, or combination of impairments or illnesses which is the equivalent of a listed impairment," Dr. Bauman states "possibly but hard data – stress test +/or coronary arteriography absolutely vital. Her treating physician recommended a stress test, but she has thus far refused." (Tr. 161-62).

Discussion

A widow may obtain disability benefits if she has a physical or mental impairment that is "of a level of severity which under the regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity." 42 U.S.C. § 423(d)(2)(B) (emphasis supplied). "To qualify for widow's disability insurance benefits, [plaintiff] must meet a more stringent standard than that applicable to wage-earner claimants: 'a widow's disability must be sufficiently severe to preclude an individual from engaging in *any* gainful activity, whereas a wage earner's disability need be sufficient to preclude an individual from engaging in any *substantial*

gainful activity.' *Gallagher v. Schweiker*, 697 F.2d 82, 84 n.2 (2d Cir. 1983). Compare 42 U.S.C. § 423(d)(2)(A) with id. 423(d)(2)(B)." *Tolany v. Heckler*, 756 F.2d 268, 269-70 (2d Cir. 1985). "Disability will be found if a widow's impairments have specific clinical findings that are 'the same as those for any impairment' on the listing of impairments in Appendix 1 [20 C.F.R. Part 404, Subpart P, appendix 1] or are 'medically equivalent' to those for any listed impairment." *Id.* at 271.

Plaintiff argues in her brief that, given the two expert medical opinions of Dr. Su and Dr. Bauman, "the ALJ who heard this matter erred in finding that plaintiff did not suffer from an impairment or combination of impairments which was the equivalent of a Listed impairment. It is on this basis that plaintiff submits that the Final Decision of the Secretary is without substantial evidence."

This Court disagrees. As required by *Brewster v. Heckler*, 786 F.2d 581, 585 (3d Cir. 1986), the ALJ made clear on the record his reasons for rejecting the opinion of the treating physician. The ALJ held that:

> Dr. Su's statement that the claimant's heart condition is "equal to Ischemic Heart Disease as stated in 4.04 of appendix one [sic]" is conclusory in nature and is unsubstantiated by references to the specific medical signs and findings required by regulation (20 C.F.R. 404.1527-1529). As noted in Social Security Ruling 83-19, an impairment may be judged to be equivalent to a listed impairment only if the medical findings (defined as a set of symptoms, signs, and laboratory findings) are at least equivalent in severity to the set of medical findings for a listed impairment. In no instance will symptoms alone justify a finding of equivalency. Consequently, Dr. Su's statement, standing alone, does not establish equivalency. [Tr. 12].

However, a review of the record under the standards discussed supra however indicates that the case must be remanded to the Secretary for reasons other than those cited by plaintiff. The record is devoid of any findings regarding the functional impact of plaintiff's ailment.

The ALJ found that the "medical findings shown in the medical evidence of record establish the existence of mitral valve prolapse" (Tr: 13); as such, plaintiff may not be able to engage in any activity. As the Second Circuit recently held,

> The procedure for widows explains that disability *will be found* if the claimant *has* a listed impairment or the equivalent; it does not state that such an impairment is the only basis for meeting the statutory standard. If a claimant has an impairment that is not listed and is not the medical equivalent of a listed impairment, *but the claimant nevertheless is unable to engage in any gainful activity*, it is difficult to see how that person may be denied benefits. It would seem anomalous if an impairment that is only presumed to be disabling because it is listed results in allowance of benefits, yet an impairment that in fact leaves the claimant without the residual functional capacity to engage in any gainful activity is insufficient to warrant benefits.

Tolany v. Heckler, 756 F.2d 268, 271 (2d Cir. 1985) (first emphasis in original, second emphasis supplied). *See also Carathers v. Bowen*, No. 85 C-6560, June 17, 1987, Northern District of Illinois (available on Lexis) ("If in fact the ALJ finds that [plaintiff] cannot work, it follows that the combination of her impairments must equal the severity of a listed impairment and that she therefore should receive benefits."); *Williams v. Bowen*, 636 F. Supp. 699, 702-03 (N.D. Ill. (1986) (In reviewing denial of

benefits, Court held, *inter alia*, "plaintiff correctly argues that the ALJ did not consider the functional impact of her hearing loss, i.e., the medically verified limitations on her ability to hear in a normal work environment. Such a consideration is required for the regulatory scheme to have real world meaning.")

As the ALJ made no findings in this regard, the Court remands for further proceedings. The Secretary is directed to inquire whether plaintiff may or may not engage in any gainful activity, as contemplated by the Act.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5318

MARILYN FINKELSTEIN

v.

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

(D.C. Civil No. 85-0345)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

[Entered Mar. 3, 1989]

JUDGMENT

Present: BECKER, HUTCHINSON and SCIRICA, Circuit Judges

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel September 8, 1988.

On consideration of the within appeal from the judgment of the said District Court entered February 19, 1988, it is now here ordered and adjudged by this Court that the appeal is dismissed for lack of appellate

jurisdiction. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Sally Mrvos
Clerk

Certified as a true copy and issued in lieu of a formal mandate on June 1, 1989

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88-5318

MARILYN FINKELSTEIN, APPELLEE

v.

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

(D.C. Civil Action No. 85-0345)

[Filed May 24, 1989]

SUR PETITION FOR REHEARING

Present: SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, Circuit Judges

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Stapleton would grant in banc rehearing and joins in Judge Becker's attached statement.

Judge Becker would grant in banc rehearing for the reasons set forth in his attached Statement Sur Denial of Rehearing In Banc.

Judge Sloviter would grant in banc rehearing and joins in Judge Becker's attached Statement.

By the Court,

/s/ William D Hutchinson
Circuit Judge

DATED: May 24, 1989

STATEMENT SUR DENIAL OF REHEARING IN BANC

BECKER, Circuit Judge.

I joined in the panel opinion, because I felt bound by our decision in *Bachowski v. Usery*, 545 F.2d 363 (3d Cir. 1976), even though that opinion seems inconsistent at least with the spirit of our later jurisprudence. *See United States v. Spears*, 859 F.2d 284 (3d Cir. 1988); *AJA Associates v. Army Corps of Engineers*, 817 F.2d 1070 (3d Cir. 1987); *Horizons International, Inc. v. Baldridge*, 811 F.2d 154 (3d Cir. 1987). I would hear this case *in banc* and hold that we have appellate jurisdiction, following the rule adopted by the D.C. Circuit in the case of *Occidental Petroleum Corp. v. Securities and Exchange Commission*, No. 87-5279, *slip. op.* at 2-11 (D.C. Cir. April 21, 1989) (D. Ginsburg, J.).

In that case, Judge Ginsburg, speaking for the court, expressed the view that Congress did not intend that the final order rule place an agency in a position of dependence upon the self-interest of others in order to get review of a legal decision that dictates the standards and procedures to be applied by the agency in making its decisions. Here, as in *Occidental*, the Secretary is between the proverbial rock and a hard place. If the Secretary, bound by the district court's opinion, grants benefits on remand to Mrs. Finkelstein, he cannot appeal. If the Secretary does not grant benefits on remand, whether or not the legal issue will be reviewed depends on whether Mrs. Finkelstein decides to press an appeal. The legal issue presented is one of great importance in the administration of the Social Security disability statute and, in practical terms, I do not believe that the government will get this issue decided, at least in the foreseeable future, in the absence of an interlocutory appeal.

I believe that the D.C. Circuit rule is a sensible application of our existing jurisprudence, which provides a narrow exception to the normal rule of non-appealability in cases in which an important legal issue is finally resolved and review of that issue would be foreclosed "as a practical matter" if an immediate appeal were unavailable. *See AJA*, 817 F.2d at 1073. Unfortunately, I read *Bachowski* as foreclosing our applying that rule to this fact pattern, hence my vote for rehearing.

Judge Sloviter and Judge Stapleton agree with this statement.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARILYN FINKELSTEIN, PLAINTIFF

v.

OTIS R. BOWEN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

Civil No. 85-345 (GEB)

ORDER

This matter having come before the Court on appeal of plaintiff pursuant to 42 U.S.C. §§ 405(g) and the Court having considered the record below and the submissions of both parties and for good cause shown

It is on this 16th day of February, 1988

ORDERED that the matter be remanded to the Secretary for further proceedings in accordance with this Court's opinion filed even date herewith.

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR., U.S.D.J.

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